

Pursuant to Ind. Appellate Rule 65(D),
this Memorandum Decision shall not be
regarded as precedent or cited before
any court except for the purpose of
establishing the defense of res judicata,
collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

JOHN C. BOHDAN
Deputy Public Defender
Fort Wayne, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL A. COZAD,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 02A03-0612-CR-565

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Robert J. Schmoll, Magistrate
Cause No. 02D04-0501-FB-8

June 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Michael A. Cozad appeals his conviction of burglary, a Class B felony. He asserts error in the admission at trial of testimony about a police scanner found inside his van at the time of his arrest and challenges the sufficiency of the evidence supporting his conviction. Concluding that the trial court did not err in admitting the scanner evidence and that the State presented sufficient evidence to support Cozad's conviction, we affirm.

Facts and Procedural History

When Sharon Humphreys left her Fort Wayne home for work on August 6, 2004, the house was secured and no one had permission to enter while she was away. When she returned home, at approximately 1:00 p.m., she attempted to back into her garage and noticed that her service door had been broken open. She discovered that her computer printer and kerosene heater were missing, and then contacted the police. She later discovered that two cases of pop and her son's tools were missing.

That same day, shortly before 11:00 a.m., an off-duty Noble County Sheriff's Deputy, Aaron Knight, saw a white van pull into his parent's driveway across the road. Knight observed a man exit the van, walk up to the house, look into the window, and then walk to the new home further back on the property. As Knight knew that his parents were away, he drove his marked Sheriff's car over to park behind the white van. When the man, subsequently identified as Cozad, returned to the van, Knight inquired as to his purpose in stopping. Cozad stated he was checking to see if the home was for sale.

Cozad provided Knight with his driver's license and registration, and Knight noticed

the registration listed the van as black, not white. Noble County Detective Sergeant Dean Gillespie arrived. Cozad, in response to questions from Knight, stated he was coming from Fort Wayne and was on his way home to Andrews, in Huntington County. When Knight pointed out that they were not near the route one would take for the drive Cozad described, Cozad stated he was lost.

Cozad then gave the deputies permission to look inside his van. There, the deputies found several packages of frozen meat, a computer printer, a kerosene heater, tools, paint cans, a laundry basket and cases of pop. The deputies also found a programmable police scanner near the driver's seat in the van. Cozad stated he acquired all of these items, except for the paint cans, from a dumpster. The police scanner was programmed with police frequencies from Allen County and Huntington County. Gloves and a tire iron with a white substance on it were also found inside the van.

Knight and Gillespie subsequently learned of the burglary at Humphreys' home in Fort Wayne and Humphreys was contacted concerning the items found in Cozad's van. Humphreys then discovered that her frozen meat had been taken. Humphreys was brought to the scene where she identified as hers the computer printer, the kerosene heater, the laundry basket, the frozen meat and the pop. Her son subsequently identified the tools as his.

Allen County Police Detective Laurie Szabo questioned Cozad regarding the items found in his van. He initially stated he recovered the items from a dumpster near a store in Fort Wayne. When Szabo pointed out that the meat was from stores that were not located near where he claimed the dumpster was located, Cozad stated he found the meat in a laundry

basket in a garbage pile in a residential area and claimed the meat had expired but was cold. Cozad also claimed that he found the printer in the same garbage pile. He stated he had been a mechanic for twenty years and the tools belonged to him. He claimed his father gave him the heater and that he had purchased the pop but did not have a receipt. Cozad also stated the tire iron had white paint on it because his van was white. Subsequent police investigation showed the paint on the tire iron was similar to the paint on Humphreys' house. When Szabo informed Cozad that the items had been taken in a residential burglary, he became angry and refused to talk.

On January 5, 2005, Cozad was charged with burglary, a Class B felony. He filed a motion in limine to prohibit the presentation of evidence of other misconduct and evidence of any prior criminal convictions. The trial court granted the motion, in part, and prohibited the presentation of evidence of any charges filed against Cozad in Noble County but permitted the presentation of evidence concerning the police scanner. After a jury trial on July 27, 2006, Cozad was found guilty. The trial court sentenced him to twelve years imprisonment in the Department of Correction. Cozad now appeals.

Discussion and Decision

I. Admission of Evidence

A. Standard of Review

The admission of evidence is within the sound discretion of the trial court. The trial court's determination whether to admit evidence will not be reversed absent a showing of a manifest abuse of discretion resulting in the denial of a fair trial. Prewitt v. State, 761 N.E.2d

862, 869 (Ind. Ct. App. 2002). An abuse of discretion involves a decision that is clearly against the logic and effect of the facts and circumstances before the court. Id. In determining the admissibility of evidence, the reviewing court will only consider the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor. Id.

B. Evidence of Police Scanner

Cozad challenges the trial court's admission into evidence of testimony that Cozad was in possession of a programmable scanner capable of receiving police communications.

During trial, Deputy Knight was asked about what he had found in Cozad's van and his response included that he found a police scanner. Cozad did not object to this testimony. Cozad did object when the State asked to admit photographs that showed the police scanner. Cozad's objection was that the photograph was irrelevant and that whatever probative value it had was outweighed by the prejudice. The objection was overruled and the photographs of the police scanner were admitted.

Cozad argues this evidence is irrelevant and its admission violates Indiana Evidence Rule 404(b), which prohibits evidence of other crimes to prove the character of a person in order to show action in conformity therewith. Cozad states as the evidence was used impermissibly to show a propensity to engage in the charged criminal behavior, the trial court abused its discretion in allowing its admission. He argues there is no evidence of record suggesting that a police scanner was used to facilitate a residential burglary committed in Allen County on the day in question.

The State points out Cozad waived this issue by failing to object when the scanner evidence was first placed before the jury. The State relies on the rule that failure to object each time the evidence is offered constitutes waiver, pursuant to Lundquist v. State, 834 N.E.2d 1061, 1067 (Ind. Ct. App. 2005). As Cozad did not object until photographs of the scanner were submitted for admission into evidence, he failed to preserve this issue for review.

Further, the State asserts the evidence was relevant and did not violate Rule 404(b). Rule 404(b) does not bar evidence of uncharged acts that are “intrinsic” to the charged offense. Lee v. State, 689 N.E.2d 435, 439 (Ind. 1997). “Other acts are ‘intrinsic’ if they occur at the same time and under the same circumstances as the crimes charged.” Wages v. State, 863 N.E.2d 408, 410 (Ind. Ct. App. 2007) (quoting Holden v. State, 815 N.E.2d 1049, 1054 (Ind. Ct. App. 2004), trans. denied). Evidence of happenings near in time and place that complete the story of the crime is admissible even if it tends to establish the commission of other crimes not included among those being prosecuted. Id.

The scanner was found in Cozad’s van with the property stolen from the burglarized home, and thus was evidence entwined with the charged offense. The evidence that Cozad possessed a scanner capable of receiving police radio traffic was relevant to demonstrating Cozad’s plan and intent because it permitted the reasonable inference that Cozad used the scanner to alert himself to police activity during the commission of the offense. This inference tended to show that Cozad planned and intended to commit the burglary. Further, there was no testimony that Cozad had stolen the scanner and therefore, the evidence did not

present “other crimes” evidence. Even if Cozad had timely objected, we cannot say that allowing the evidence pertaining to the police scanner was an abuse of the trial court’s discretion.

II. Sufficiency of the Evidence

A. Standard of Review

When reviewing a claim of insufficient evidence, we will not reweigh evidence or judge witnesses’ credibility. Allen v. State, 743 N.E.2d 1222, 1230 (Ind. Ct. App. 2001), trans. denied. We will consider only the evidence favorable to the judgment and the reasonable inferences drawn therefrom. Id. We will affirm a conviction if the lower court’s decision is supported by substantial evidence of probative value. Id.

B. Evidence of Burglary

Cozad asserts there is no evidence establishing beyond a reasonable doubt that he committed the burglary. He states that while he ended up with property that unquestionably originated at the burglarized home, there was an absence of evidence that he was the individual that removed it.

A person who breaks and enters the home of another person, with intent to commit a felony in it, commits burglary, a Class B felony. Ind. Code § 35-43-2-1. A burglary conviction may be sustained on circumstantial evidence. Allen, 743 N.E.2d at 1230. Further, unexplained possession of recently stolen property, so long as there is evidence that a burglary in fact occurred, provides support for an inference of guilt of theft of that property. Id. A defendant’s possession of the stolen property remains “unexplained” where the jury

rejects the defendant's explanation for his possession of the property as being unworthy of credit. Id.

Here, Humphreys secured her home before she left for work but upon her return she discovered that her garage service door had been broken open. Items were removed from the home. Police found Cozad had possession of the items stolen from Humphreys' home before Humphreys discovered that her home had been burglarized. Further, Cozad provided the police with various explanations regarding how he came into possession of the stolen items. Cozad's possession of the goods shortly after the burglary, together with his various explanations of his possession, was ample evidence to support the jury's finding that he was the person who had acquired the goods through the perpetration of the burglary.

Conclusion

The trial court did not abuse its discretion by admitting into evidence the testimony regarding the scanner. The State presented sufficient evidence to sustain Cozad's conviction for burglary. Accordingly, we affirm.

Affirmed.

VAIDIK, J., concurs.

SULLIVAN, J., concurs in result.